

Supreme Court, U. S.

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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OCTOBER TERM, 1977

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No. 77-208

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AMALGAMATED TRANSIT UNION, LOCAL 788,  
Petitioner,

v.

BEN ALLEN, et al.,  
Respondents.

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**BRIEF IN OPPOSITION TO PETITION FOR A  
WRIT OF CERTIORARI**

**To the United States Court of Appeals  
for the Eighth Circuit**

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LOUIS GILDEN  
722 Chestnut Street  
St. Louis, Missouri 63101  
Attorney for Respondents



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IN THE  
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OCTOBER TERM, 1977

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No. 77-208

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AMALGAMATED TRANSIT UNION, LOCAL 188,  
Petitioner,

v.

BEN ALLEN, et al.,  
Respondents.

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**BRIEF IN OPPOSITION TO PETITION FOR A  
WRIT OF CERTIORARI**

**To the United States Court of Appeals  
for the Eighth Circuit**

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**OPINIONS BELOW**

The opinion of the District Court is reported at 415 F.Supp. 662 (E.D.Mo. 1976). The opinion of the Court of Appeals is reported at 554 F.2d 876 (8th Cir. 1977).

### **JURISDICTION**

The opinion of the Court of Appeals was filed on May 9, 1977 (App.<sup>1</sup> I, p. A-1). Petitioner filed Suggestions for Reconsideration of the Court's opinion based on *United Air Lines, Inc. v. Evans*, — U.S. —, 52 L.Ed.2d 571 (1977), on June 8, 1977. This was denied by the Court of Appeals on June 23, 1977 (App. II, p. A-18).

On August 2, 1977, this Court extended the time for filing the Petition for Writ of Certiorari until September 6, 1977. On August 11, 1977, this Court extended the time to file a response to the Petition for Writ of Certiorari to and including September 22, 1977.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

### **QUESTION PRESENTED FOR REVIEW**

Whether petitioner's disparate application of a provision of the collective bargaining agreement to the detriment of the black respondents is a current and present violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981.

### **STATUTES INVOLVED**

#### **U.S.C., Title 42, Section 1981 Equal rights under the law**

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and

<sup>1</sup> App. is Appendix to Petition for Writ of Certiorari filed by Petitioner.

enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

#### **U.S.C., Title 42, Section 2000e-2(c) Labor organization practices**

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

#### **U.S.C. Title 42, Section 2000e-5(f)(1)**

Civil action by . . . person aggrieved; . . . .  
. . . . within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . .



**Revised Statutes of Missouri, Section 516.120**  
**What Actions Within Five Years**

Within five years:

(1) All actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, and except upon judgments or decrees of a court of record, and except where a different time is herein limited;

(2) An action upon a liability created by a statute other than a penalty or forfeiture;

(3) An action for trespass on real estate;

(4) An action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated;

(5) An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud. (R.S. 1939, § 1014)

**STATEMENT OF THE CASE**

The collective bargaining agreement between petitioner, Union, and Bi-State Development Agency, the employer, for the period of June 1, 1973, to August 31, 1975, contained the following provision:

Seniority of each of the full-time operators covered by this Agreement shall be on a system basis. The years of service of each of the full-time operators with each of their predecessor transit companies shall be counted from date of last

employment and given full credit in the seniority roster. (App. I, p. A-4; Appendix III, pps. A-26, 27).<sup>2</sup>

Petitioner Union granted the substantially white transit operators full credit in the seniority roster for their years of service with their predecessor transit company (App. III, p. A-24).

However, the black respondents who had worked for the Consolidated Service Car Company<sup>3</sup> received no credit from Petitioner in the seniority roster for their years of service with their predecessor transit company (App. I, p. A-4; App. III, p. A-26), while by contrast, Bi-State Development Agency, the employer, had granted respondents full seniority credit for company purposes for their years of prior service with CSC (App. I, p. A-5; App. III, p. A-28).

The Appeals Court found that there is substantial evidence that the Union consistently blocked respondents' efforts regarding their proper seniority rights<sup>4</sup> (App. I, p. A-14).

Both the District Court and the Appeals Court found that petitioner has no justifiable reason for not applying the collective bargaining provision to respondents (App. I, p. A-6; App. III, p. A-28).

The Appeals Court sustained the finding of racial discrimination on the part of petitioner made by the District Court under

<sup>2</sup> Plaintiff's Exhibit 7.

<sup>3</sup> Hereinafter referred to as CSC.

<sup>4</sup> The Union president told respondents that the matter of their seniority would have to be put to a vote before the "rank and file" Union membership; however, he refused to place the matter before the rank and file because the action might cost him his office at the next election. Later, a motion was made and seconded at a full Union meeting for full seniority rights for the former CSC employees; however, it was not entertained because charges had been filed by respondents before the City, State and Federal Commissions (App. I, p. A-5).

both Title VII and 42 U.S.C. § 1981,<sup>5</sup> and found disparate treatment between the white and black members of the Union. Both Courts held that the black respondents are unable to enforce the provision in the collective bargaining agreement for full credit in the seniority roster for their years of service with CSC, which their white counterparts were able to enforce with petitioner, and in which the white transit workers obtained full credit in the seniority roster from the Union for their years of service with their predecessor transit companies (App. I, pps. A-7, 11; App. III, p. A-29).

Both Courts also found that the disparate treatment is intentional race discrimination, and the circumstances warrant the payment of punitive damages to respondents under 42 U.S.C. § 1981 (App. I, p. A-15; App. III, p. A-30).

Two of the respondents had filed their charges with the E.E.O.C. in March, 1971. The E.E.O.C. issued a reasonable cause determination on August 21, 1972 that petitioner violated Title VII, and these two respondents were issued their Notices of Right to Sue Within 90 Days on June 13, 1974. This action was brought by the 15 respondents against the Union on July 5, 1974 (App. I, pps. A-4, 5).

After the Appeals Court filed its opinion, petitioner filed Suggestions with the Appeals Court to reconsider its opinion based on this Court's opinion in *United Air Lines, Inc. v. Evans, supra*. The Appeals Court denied this Motion (App. II, pps. A-18, 19).

The issue before this Court is whether this action was timely brought on July 5, 1974, based on 42 U.S.C. § 1981 and § 2000e *et seq.*, at a time when petitioner was currently and presently violating the law by disparate treatment of the black

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<sup>5</sup> A second count alleging that the Union had breached its duty of fair representation under 29 U.S.C. § 185 was an issue not passed on by the Appeals Court since they granted relief under 42 U.S.C. § 1981 and § 2000e *et seq.* (App. I, p. A-2).

respondents in the enforcement of a provision of a collective bargaining agreement that covered the period from June 1, 1973, to August 3, 1975.

It is conceded that there is a five year Statute of Limitations in Missouri for the commencement of an action under 42 U.S.C. § 1981, Mo.Rev.Stat. § 516.120 (1969) (Brief Pet. p. 6; App. I, p. A-7; App. III, p. A-29).

### REASONS FOR DENYING THE WRIT

Both the District Court and the Appeals Court found a present and current violation of 42 U.S.C. § 1981 and § 2000e *et seq.* when they held that petitioner intentionally discriminates against respondents by reason of race in its disparate treatment between the white members of the Union and the black members (respondents).<sup>6</sup> This is demonstrated by the respondents' inability to enforce a provision of the collective bargaining agreement which their white counterparts were able to enforce.<sup>7</sup>

Since there has been a finding of a present violation of the Statutes by petitioner, the criteria of *United Air Lines, Inc. v. Evans, supra* at p. 578 has been satisfied.<sup>8</sup>

In *Evans*, this Court stated that Evans had not alleged that United's administration of the seniority system had violated the

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<sup>6</sup> In *International Brotherhood of Teamsters v. United States*, — U.S. —, 52 L.Ed.2d 396, 415, n. 15 (1977) this Court stated that disparate treatment is the most easily understood type of discrimination.

<sup>7</sup> The District Court found that the following provision existed in the collective bargaining agreement *at the time of their membership* with the Union (App. III, pps. A-26, 27):

Seniority of each of the full-time operators covered by this Agreement shall be on a system basis. The years of service of each of the full-time operators with each of their predecessor transit companies shall be counted from date of last employment and given full credit in the seniority roster. (Plaintiff's Exhibit 7; Agreement covering period from June 1, 1973, to August 3, 1975).

and the Appeals Court held:

[t]he evidence supports a finding that the black plaintiffs were unable to enforce a provision of the collective bargaining agreement which their white counterparts were able to enforce. We accordingly affirm the district court's finding of racial discrimination. (App. I, p. A-7).

<sup>8</sup> The Appeals Court was requested by Petitioner to reconsider its opinion based on *United Airlines, Inc. v. Evans, supra*, and this request was denied by the Court.

See also, *Clark v. Olinkraft, Inc.*, 556 F.2d 1219 (5th Cir. 1977).

collective bargaining agreement covering her employment, and had not alleged that United's seniority system differentiates between similarly situated males and females on the basis of sex (52 L.Ed.2d at p. 577, 578); however, by contrast, here respondents have alleged, and the District and Appeals Courts have found, that the Union's administration of the seniority system currently and presently violates the collective bargaining agreement covering their employment, and that petitioner's administration of the seniority system differentiates between similarly situated blacks and whites solely on the basis of race.<sup>9</sup>

Thus, this action was timely filed by respondents.<sup>10</sup>

### CONCLUSION

Since respondents have shown a present and current violation of the law, the Petition for a Writ of Certiorari should be denied, and this Court should refuse to vacate and summarily reverse the decision of the Court of Appeals.

Respectfully submitted,

LOUIS GILDEN  
722 Chestnut Street  
Suite 1501  
St. Louis, Missouri 63101  
Attorney for Respondents

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<sup>9</sup> The white transit workers were given full credit by the petitioner in the seniority roster for their years of service with each of their predecessor transit companies, while the black respondents were given no credit by petitioner for their service with their predecessor transit companies. By contrast, the employer, Bi-State Development Agency, had given the respondents full seniority credit for company purposes (App. I, p. A-5).

<sup>10</sup> Mo. Rev. Stat. § 516.120 (1969), 42 U.S.C. § 2000e-5(f)(1).